

# EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

FS MEDICAL SUPPLIES, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action Nos.
	)	3:21-CV-501-RJC-WCM
TANNERGAP, INC., et al.,	)	3:23-CV-598-RJC-WCM
	)	
Defendants.	)	
	)	
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VIDEOTAPED 30(b)(6) DEPOSITION  
OF TANNER PHARMA UK LIMITED - VOLUME III,  
BY AND THROUGH ITS CORPORATE DESIGNEE,  
KATHERINE SMOOT

---

TAKEN AT THE LAW OFFICES OF:  
MCGUIREWOODS, LLP  
201 North Tryon Street, Suite 3000  
Charlotte, NC 28202

12-12-2024  
9:58 O'CLOCK A.M.

---

Laura Baker  
Court Reporter

Chaplin & Associates  
132 Joe Knox Ave, Suite 100-G  
Mooresville, NC 28117  
(704) 606-1434 | (336) 992-1954 | (919) 649-4444

1 Q. So ---

2 A. --- had any additional conversation, other  
3 than the email.

4 Q. So just so that the record is clear, is it  
5 your testimony that you don't know whether Tanner ever  
6 gave guidance to Mr. Bourne as to how he should go  
7 about preserving documents on his cell phone? Is your  
8 answer that you don't know?

9 A. I don't think that they've given guidance,  
10 but I don't know.

11 Q. What makes you think that they haven't given  
12 guidance?

13 A. Nothing.

14 Q. Nothing makes you think that?

15 A. I don't ---

16 MR. KUTROW: There's no indication that  
17 the witness is aware of -- that such guidance was  
18 given.

19 Q. (Mr. Puig) Okay. At the time that Tanner  
20 issued the Litigation Hold Notice to Mr. Bourne, did  
21 the company ask Mr. Bourne whether any auto-delete  
22 functions were activated on his cell phone?

23 A. No. And we didn't have it in the litigation  
24 hold either.

25 Q. You didn't have what in the litigation hold?

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1           **A.     Any direction to look for auto-delete.**

2           Q.     There was a direction that records including  
3     text messages should be preserved though, right?

4           **A.     That is correct.**

5           Q.     If you flip to Page -- the last page of  
6     Exhibit 714.

7           **A.     Okay -- wait.   Yeah.   Okay.**

8           Q.     Do you see that there's something called a  
9     "Do Not" list?

10          **A.     Yeah.**

11          Q.     Do you see that the first bullet of the "Do  
12     Not" list is, "Do not delete or destroy, dispose of,  
13     discard, remove or lose any of the above Records"? Do  
14     you see that?

15          **A.     I do.**

16          Q.     My question is, did Tanner investigate  
17     whether Mr. Bourne's auto-delete function on his cell  
18     phone was active at the time that it issued the  
19     Litigation Hold Notice?

20                   MR. FULLER:   I'm sorry.   Can you say  
21     that again?   And I'll say, I just couldn't hear you.

22                   MR. PUIG:    Sure.

23          Q.     (Mr. Puig)   At the time that the Litigation  
24     Hold Notice was issued to Mr. Bourne in January of  
25     2022, did Tanner undertake any investigation as to

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1 whether the auto-delete function on his cell phone was  
2 enabled or disabled?

3 A. So I will say, that in the actual litigation  
4 hold, in the "Do Not" list, it doesn't say anything  
5 about "Do not turn on or off any of those do not  
6 delete."

7 And I didn't even know that was a function  
8 until this all occurred. So I will answer your  
9 question in saying, no, we didn't investigate that  
10 because we didn't think that that was even a thing.

11 And it didn't pull it out in our litigation  
12 hold, and we've never had litigation before, so this  
13 was new to us. So I can answer your question as no.  
14 We didn't know any better.

15 Q. You can -- you can -- if you turn to the  
16 first page of the Litigation Hold Notice, do you see  
17 the second paragraph?

18 A. Oh, litigation hold itself?

19 Q. Yes, ma'am.

20 A. Yeah.

21 Q. Do you see that the second paragraph says,  
22 "We are required by law to take steps to preserve  
23 information and documents relating (or potentially  
24 relating) to this matter and we need your immediate  
25 assistance in fulfilling this legal obligation"?

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1    iClouds. We have our server. So having cloud-based  
2    capability, we understood at the time that those were  
3    taking the steps to preserve the data.

4            Q.    Are you, like, a -- like, a tech-savvy  
5    person, Ms. Smoot?

6            A.    It depends on how you define tech-savvy, but  
7    I do have technology under me.

8            Q.    Are you the person at the company that's in  
9    charge of monitoring compliance with legal hold  
10   notices?

11           A.    It's a shared -- I would say it's a shared  
12   support because on business operations, we have legal  
13   and compliance.

14           Q.    Uh-huh. But just so the record is clear,  
15   nobody at the company asked Mr. Bourne whether the  
16   auto-delete function on his phone was enabled or  
17   disabled at the time the Litigation Hold Notice was  
18   issued, correct?

19           A.    To my knowledge, yes, that's correct,  
20   because we wouldn't have known to do that.

21           Q.    Did anybody at the company ask to inspect  
22   Mr. Bourne's cell phone?

23           A.    Not to my knowledge or information.

24                   MR. PUIG: Why don't we take a break?

25                   THE VIDEOGRAPHER: Off record, 10:58.

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1 counsel as to why -- I can't speak to it.

2 Q. (Mr. Puig) So is your testimony that you  
3 don't know why Tanner waited 11 months to tell its  
4 employees to preserve documents?

5 A. Without speculating, correct.

6 Q. Okay. When Tanner issued its Litigation  
7 Hold Notice to Mr. Bourne and Mr. Bracey and others in  
8 January of 2022, did Tanner take any steps to monitor  
9 compliance with the Litigation Hold Notice?

10 A. Tanner itself or counsel or both? There  
11 were steps throughout the process, but for us,  
12 internally, we knew we had our server data, what was  
13 -- we call enterprise data. And we do not delete that  
14 data. So there was nothing else for us to do.

15 We did not have a document retention policy  
16 in place that defines retention periods to delete. We  
17 don't delete data. So there was no additional steps  
18 to take, we thought, at that time.

19 Q. So Tanner relied on the fact that its  
20 enterprise data was automatically preserved, but  
21 otherwise did not take any steps to monitor compliance  
22 with the Litigation Hold Notice. Do I have that  
23 right?

24 A. Again, I know, like, in the chronology, that  
25 our outside counsel had spoken with Bracey a few times

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1     **reiterate that we're on the litigation hold.**

2           Q.     So what you're describing to me is a little  
3     different than that I'm -- what I'm -- what I'm asking  
4     about. You're telling me that you had senior  
5     leadership team meetings where the topic of the  
6     litigation hold was sometimes discussed. Is that  
7     right?

8           A.     **Just -- yes, that we have a litigation hold,**  
9     **we're unable to delete data.**

10          Q.     Is Mr. Bourne in those meetings?

11          A.     **Not typically the senior management team**  
12     **meetings. He will come to the risk council meetings.**

13          Q.     My question is, were there affirmative steps  
14     taken by Tanner to monitor compliance with  
15     Mr. Bourne's observance of the litigation hold, other  
16     than relying on the automatic retention of enterprise  
17     data?

18          A.     **Not to my knowledge.**

19          Q.     After the Litigation Hold Notice was issued,  
20     were there trainings offered by the company about how  
21     to ensure compliance with the Litigation Hold Notice?

22          A.     **No. Then again, it's because we were under**  
23     **the -- we as a company have always seen our enterprise**  
24     **data as our -- the data that we were supposed to hold,**  
25     **and that's the data that we don't delete.**

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1                   So there was no need for anybody to do --  
2                   for what we thought at the time, to do any type of  
3                   training because we were under the assumption at the  
4                   time that that was all the data that we needed to  
5                   retain.

6                   Q.     So the answer to my question is no?

7                   A.     What was the question, then? I want to make  
8                   sure.

9                   Q.     There were no ---

10                  A.     Oh, the training. No. There were no  
11                  specific trainings done around the litigation hold, to  
12                  my knowledge.

13                  Q.     And no efforts to monitor Mr. Bourne's  
14                  compliance with the Litigation Hold Notice?

15                  A.     Not internal to Tanner.

16                  Q.     Are you aware of any efforts to monitor  
17                  Mr. Bourne's compliance with the Litigation Hold  
18                  Notice, internal or external?

19                  A.     I'm not aware.

20                  Q.     Are you aware that Mr. Bourne's counsel at  
21                  Robinson Bradshaw retained somebody named Clark C.  
22                  Walton and the firm Reliance Forensics, LLC in October  
23                  2023 to assist with electronic discovery and digital  
24                  forensic issues in this matter?

25                  A.     Yes.

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1 Bourne's.

2 Q. (Mr. Puig) --- Bourne's phone was performed  
3 by counsel for Tanner in March of 2023. Is that  
4 right?

5 MR. KUTROW: Objection to form. And  
6 Reliance did it at the direction of Tanner's counsel,  
7 Reliance being Mr. Walton.

8 THE WITNESS: Oh, oh -- I'll answer.  
9 Yes. It was March of -- let me make sure I'm saying  
10 it right, but yes, March 8th of 2023.

11 Q. (Mr. Puig) Do you understand that in June  
12 of 2024, it was discovered that Mr. Bourne's phone had  
13 been set to auto-delete text messages older than 30  
14 days?

15 A. Yes.

16 Q. You're aware that the default setting on an  
17 iPhone is to keep text messages forever?

18 A. Yes, it's to keep -- yeah, it's to keep it  
19 just without deletion. Uh-huh.

20 Q. Do you understand when I say "default  
21 setting," like if we were to walk into ---

22 A. I know what it is.

23 Q. --- an Apple store today and buy ---

24 A. Yes.

25 Q. --- an iPhone, it would be set to keep text

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1 messages forever. Do you understand that?

2 **A. Yeah, yes. Uh-huh.**

3 Q. And do you understand that, in order for the  
4 auto-delete function to be activated, a real-life  
5 human being has to change the default setting?

6 **A. In theory, yes.**

7 Q. In theory and in practice, right?

8 **A. Absolutely. I mean, you can butt dial**  
9 **things, and stuff can happen, but I'm not saying**  
10 **that's what happened. I'm just -- I mean, I can't say**  
11 **anything in absolutes, but yes, it should be mostly a**  
12 **person.**

13 Q. Right. So it's like -- it's not elves,  
14 right, that activate the setting?

15 **A. No.**

16 MR. KUTROW: Objection to form.

17 **THE WITNESS: That's correct, yeah.**

18 Q. (Mr. Puig) Do you understand that that  
19 can't happen by accident?

20 **A. The likelihood of it being an accident is**  
21 **low, yes.**

22 Q. Do you understand that the setting can only  
23 be activated by somebody who has access to the phone?

24 **A. Yes.**

25 Q. Somebody who has the phone's password,

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1 should the phone have a password?

2 **A. Yes.**

3 Q. And do you understand that after this  
4 setting is activated, messages older than the  
5 retention period are automatically and permanently  
6 deleted from the device?

7 **A. From the device, not necessarily the iCloud.**

8 Q. So yes?

9 **A. Yes.**

10 Q. When this discovery was made in June 2024,  
11 did the company question Mr. Bourne regarding when  
12 this setting was activated?

13 **A. Yes.**

14 Q. And what did Mr. Bourne tell the company?

15 **A. It's in a declaration. He did a declaration**  
16 **around that, so he said he had -- he did not know how**  
17 **it happened.**

18 Q. So I'm not asking what's in the declaration.  
19 I'm asking -- I asked you whether the company ---

20 MR. KUTROW: I'm going to object to the  
21 form of the question at this point because she -- the  
22 witness understands what's in the declaration.

23 The investigation or the inquiry you're  
24 talking about would have been performed by counsel,  
25 and it would have been performed by Mr. Bourne's

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1 Q. (Mr. Puig) And that is why I'm asking the  
2 question the way that I'm asking it, and I ask you to  
3 listen carefully.

4 A. I'm listening.

5 Q. Did Tanner, the company, somebody at the  
6 company ---

7 MR. KUTROW: A non-lawyer at the  
8 company?

9 MR. PUIG: Yes.

10 Q. (Mr. Puig) Have a conversation with  
11 Mr. Bourne after the discovery was made in June 2024  
12 that all of his text messages had been deleted?

13 MR. KUTROW: And that would be work  
14 product. I'll object on that basis and instruct the  
15 witness not to answer.

16 Q. (Mr. Puig) Have you read Mr. Walton's  
17 declaration?

18 A. Yes.

19 Q. Do you understand from Mr. Walton's  
20 declaration that all SMS and iMessage text messages  
21 sent or received by Mr. Bourne on his iPhone prior to  
22 November 25th, 2022, have been permanently deleted?

23 A. Prior to November 2022?

24 (Witness examines document)

25 A. Yes.

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1 Q. And according to Mr. Walton, even  
2 state-of-the-art forensic methods cannot retrieve  
3 those deleted text messages, right?

4 MR. KUTROW: Referring to the SMS text  
5 messages, correct?

6 MR. PUIG: And the iMessages.

7 THE WITNESS: Yes, according to his  
8 testimony.

9 Q. (Mr. Puig) So you understand that that ESI  
10 is permanently lost, right?

11 A. I do. Yeah.

12 Q. Do you have any idea whether Mr. Bourne used  
13 his cell phone to communicate with Tanner employees  
14 regarding Tanner's work?

15 A. Yes, he has.

16 Q. Do you understand that Mr. Bourne used his  
17 cell phone to send text messages about FSMS and its  
18 principles?

19 A. Typically, it would have been WhatsApp, but  
20 yes, text messages were used.

21 Q. Do you understand that Mr. Bourne used his  
22 cell phone to send text messages about the UK  
23 government opportunity?

24 A. Typically, it would have been WhatsApp if it  
25 was outside of our typical communication of email, but

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1 Q. Great question. If you look at the first  
2 page, if it's a WhatsApp, it'll have a WhatsApp  
3 signifier in the phone number. That's how I know.

4 A. Okay. That's awesome. Thank you.

5 Q. And you understand that pursuant to the  
6 Litigation Hold Notice -- we can just take a look at  
7 Exhibit 714 as an example.

8 A. Where's 714? Is that...

9 MR. KUTROW: It's the litigation hold  
10 addressed to Banks.

11 THE WITNESS: Okay. All right. So  
12 it's ---

13 MR. FULLER: Which one are we looking  
14 at?

15 MR. PUIG: 714.

16 MR. FULLER: 714.

17 THE WITNESS: Okay.

18 Q. (Mr. Puig) And we can look at Page 2 of the  
19 Litigation Hold Notice.

20 A. Yes.

21 Q. Do you see there's a heading that says  
22 "Categories of Information to Preserve"?

23 A. Yes.

24 Q. And then there's a line that says, "You must  
25 immediately preserve the following records." And

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1 there's some bullets.

2 Do you see that?

3 **A. Yes.**

4 Q. And the hold notice says that the recipient  
5 of the hold has to preserve "all Records related to  
6 the Dispute," right?

7 **A. Yes.**

8 Q. "All Records relating to GAP's sale and/or  
9 distribution of PPE or COVID rapid-antigen tests to  
10 any third party."

11 **A. Yes.**

12 Q. "Any and all Records relating to Tanner UK's  
13 sale and/or distribution of PPE or COVID rapid-antigen  
14 tests to any third party."

15 **A. Yes.**

16 Q. "Any and all Records relating to the sale  
17 and/or purchase of PPE or COVID rapid-antigen test  
18 kits from Zhejiang Orient Gene Biotech by Tanner UK or  
19 GAP."

20 **A. Yes.**

21 Q. "Any and all Records relating to the sale,  
22 purchase, or distribution of PPE and/or COVID  
23 rapid-antigen test kits from GAP or Tanner UK to  
24 UKDHSC."

25 **A. Yes.**

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1 Q. And it goes on. I'm not going to read them  
2 all.

3 A. Okay.

4 Q. And you would agree with me that, provided  
5 there were text messages on Mr. Bourne's phone related  
6 to these topics, that Tanner had an obligation to  
7 preserve those documents, right?

8 A. Yes.

9 MR. PUIG: Okay. Let's take a break.

10 MR. KUTROW: Okay. Let's make it a  
11 short one, okay? I mean, this is -- this is ---

12 THE VIDEOGRAPHER: Off record, 11:35.

13 (Brief recess: 11:35 a.m. to 11:45 a.m.)

14 THE VIDEOGRAPHER: On record, 11:45.

15 Q. (Mr. Puig) Ms. Smoot, you mentioned earlier  
16 that there were executive leadership meetings during  
17 which the Litigation Hold Notice and the obligation to  
18 preserve documents might have been discussed.

19 A. Senior management team meetings. Yes.

20 Q. Senior management team meetings. Thank you.  
21 And I believe your testimony was that Mr. Bourne did  
22 not come to those, but he came to risk committee  
23 meetings. Is that right?

24 A. Yeah. So our senior management team  
25 meetings, Banks is not part of because he's not in the

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1 day-to-day. But risk council is inclusive of -- it  
2 includes him.

3 Q. And did you -- did you say that at the risk  
4 management ---

5 A. Risk council.

6 MR. KUTROW: Risk council.

7 Q. (Mr. Puig) Risk council?

8 A. Yeah.

9 Q. I'm sorry.

10 A. That's fine.

11 Q. At the risk council meetings that the topic  
12 of the litigation hold and the need to preserve  
13 documents was sometimes discussed?

14 A. It was part of discussions. Yes.

15 Q. Were -- at the risk council meetings, were  
16 -- was the obligation to preserve ESI, like text  
17 messages, specifically discussed?

18 A. No.

19 Q. And if we take a look at Exhibit 713, which  
20 is the timeline that your counsel provided to us.

21 A. Uh-huh.

22 Q. I gathered this morning, as I was looking at  
23 it, that kind of light yellow, beige color, those are  
24 events that are related to Mr. Bracey. Is that right?

25 A. Yes.

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1 Q. And the events related to Mr. Bourne are  
2 kind of in that pink color?

3 A. Yes.

4 Q. And the events that are related to  
5 Mr. Bourne, on this chronology, are -- the first one  
6 we see -- the first page, that's January 25th, 2022.  
7 And it says, "Mr. Bourne receives the litigation  
8 hold," and then, "acknowledges litigation hold"?

9 A. Uh-huh. Yes.

10 Q. And Mr. Bourne acknowledged receipt of the  
11 litigation hold. Is that right?

12 A. Yes.

13 Q. How did that happen?

14 A. Email.

15 Q. So you sent a response to the email, saying,  
16 "I acknowledge receipt of the litigation hold"?

17 A. Yes. He responded to the email.

18 Q. Okay. And then the next entry that pertains  
19 to Mr. Bourne is on March 8th, 2023. And that's where  
20 we see "Tanner's vendor Reliance Forensics takes a  
21 forensic image of B. Bourne's iPhone." Is that right?

22 A. Yes, that's correct.

23 Q. And then I believe the only other entry on  
24 this document related to Mr. Bourne is the one that we  
25 see on October 18th, 2023, which is "Tanner receives a

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1 copy of the Bournes' litigation hold notice."

2 And I believe that's Exhibit 716. Do I have  
3 that right?

4 MR. FULLER: I think the one you were  
5 talking about was 715, unless I've written it down  
6 wrong.

7 MS. FOSS: No, it's 716.

8 **THE WITNESS: Yes, you're correct.**

9 MR. FULLER: Oh, sorry. My fault. My  
10 fault. I apologize.

11 Q. (Mr. Puig) So my question is, other than  
12 these three events that we see on the ledger that your  
13 counsel provided and the risk council meetings, are  
14 you aware of any communications between Tanner and  
15 Mr. Bourne regarding the Litigation Hold Notice and  
16 his obligation to preserve documents?

17 **A. No, I'm not aware.**

18 Q. Okay. How often does the risk council meet?

19 **A. Once every quarter.**

20 Q. And you mentioned that there were no  
21 discussions at risk council meetings that Mr. Bourne  
22 might have attended regarding the preservation of text  
23 messages or ESI on the phone specifically, correct?

24 **A. Not on the phone specifically, no.**

25 Q. Okay. You understand from Mr. Walton's

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1 declaration that text messages, SMS, MMS and iMessages  
2 prior to November 25th, 2022, are permanently lost and  
3 can't be recovered even by the most modern forensic  
4 methods, right?

5 **A. Right.**

6 Q. And you understand that Tanner's vendor,  
7 Reliance Forensic, took the first forensic image of  
8 Mr. Bourne's iPhone on March 8th, 2023?

9 **A. Yes.**

10 Q. Which was about a year and two months after  
11 the Litigation Hold Notice was first issued to  
12 Mr. Bourne, right?

13 **A. Correct.**

14 Q. And about two years and a month after FSMS  
15 first notified Tanner of its claims against Tanner,  
16 right?

17 **A. Yes. Was there a requirement to do that**  
18 **before?**

19 Q. It's a -- it's a legal question.

20 MR. KUTROW: Exactly.

21 **THE WITNESS: To my understanding, in**  
22 **jurisdiction, there was an agreement to -- that we did**  
23 **not have to pull information from the phones, just**  
24 **from a cost savings perspective, so...**

25 MR. KUTROW: She means jurisdictional

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1 Q. I'm asking, could Tanner have made the  
2 decision to forensically image Mr. Bourne's phone in  
3 January of ---

4 A. Oh, January.

5 Q. In February of 2021, when it was put on  
6 notice that Tanner had claims -- that FSMS had claims  
7 against Tanner.

8 A. I mean, I would be, again, speculating on  
9 that. I don't -- why would we -- why would we have  
10 taken his phone in February of 2021? We got a demand  
11 letter. Why would we take the phone at that time and  
12 do a forensic? I -- so I don't ---

13 Q. I want you to assume with me, Ms. Smoot,  
14 that a company's obligation to preserve documents  
15 arises when it anticipates litigation, okay?

16 A. Uh-huh.

17 Q. So with that assumption in mind, could  
18 Tanner, in February of 2021, after it received the  
19 demand letter from FS Medical Supplies, have made the  
20 decision to image Mr. Bourne's phone?

21 A. That would be a counsel decision.

22 Q. Would it have been possible for Tanner, if  
23 counsel had directed Tanner to do so, for Mr. Bourne's  
24 phone to be imaged in February of 2021 after Tanner  
25 received the demand letter from FS Medical Supplies?

12-12-24

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1           A.    Is it possible -- our counsel would have  
2   done that, but I would say it's possible.

3           Q.    Nothing would have prevented that -- nothing  
4   is -- that you're aware of, would have prevented that  
5   from happening, right?

6           A.    Not that I'm aware of. I ---

7           Q.    And had that occurred in February of 2021,  
8   is it possible that Tanner would have captured some of  
9   the text messages that have been permanently lost?

10                   MR. FULLER:  Objection.

11                   MR. KUTROW:  Objection.

12                   **THE WITNESS:  In technicality,**  
13   **potentially.**

14           Q.    (Mr. Puig)  Is it possible that in January  
15   2021 -- or February 2021, Mr. Bourne's auto-delete  
16   function wasn't activated?

17           A.    Is it ---

18                   MR. KUTROW:  Objection to the form.

19                   MR. FULLER:  Objection.

20                   MR. KUTROW:  There's just no factual  
21   information available to the company to know that.

22           Q.    (Mr. Puig)  You can answer.

23           A.    I don't -- I don't want to speculate. I  
24   don't -- I don't know.

25           Q.    You don't know, because the company doesn't

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